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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

COMMUNITY ASSOCIATION FOR
RESTORATION OF THE
ENVIRONMENT, INC., a Washington
Non-Profit Corporation
and
CENTER FOR FOOD SAFETY, INC.,
a Washington, D.C. Non-Profit
Corporation,
Plaintiffs,

v.

COW PALACE, LLC, a Washington
Limited Liability Company, THE
DOLSEN COMPANIES, a Washington
Corporation, and THREE D
PROPERTIES, LLC, a Washington
Limited Liability Company,
Defendants.

CASE NO. CV-13-3016-TOR

**COW PALACE, LLC'S MOTION
TO STRIKE UNDISCLOSED
EXPERT TESTIMONY**

Noted: January 6, 2015
1:00 pm
Spokane, Washington

I. INTRODUCTION

The Federal Rules of Civil Procedure require that experts disclose a “complete statement of all opinions the witness will express and the basis and reasons for them.” Fed. R. Civ. P. 26(a)(2). The Court ordered that the parties make these disclosures no later than September 22, 2014 (for initial reports) and October 20, 2014 (for rebuttal reports). ECF No. 140 at ¶5. Both parties submitted reports on those dates, and both parties deposed experts during the last week of October and the first week of November. Notwithstanding Rule 26 and the Court’s Order, Plaintiffs submitted new expert testimony in support of their Motion for Summary Judgment. These untimely opinions should be stricken. Fed. R. Civ. P. 37(c)(2) (“If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion”)

II. ARGUMENT

A. Legal Standard

Federal Rule of Civil Procedure 26(a)(2) governs the disclosure of expert testimony. Under Rule 26, written expert reports must contain, *inter alia*, “a complete statement of all opinions the witness will express and the basis and reasons for them.” Fed. R. Civ. P. 26(a)(2)(B)(i) (emphasis added). And, “[a] party must make these disclosures at the times and in the sequence that the court orders.” Fed. R. Civ. P. 26(a)(2)(D).

Rule 37(c)(1) sets forth, in no uncertain terms, the consequences that flow from failing to timely disclose expert opinions: “If a party fails to provide

1 information or identify a witness as required by Rule 26(a) or (e), *the party is not*
2 *allowed to use that information* or witness to supply evidence on a motion, at a
3 hearing, or at a trial, unless the failure was substantially justified or is harmless.”
4 Fed. R. Civ. P. 37(c)(1) (emphasis added). These “self-executing” and
5 “automatic” exclusion sanctions serve an important purpose. *Theoharis v. Rongen*,
6 2014 WL 3563386, *8 (W.D. Wash. 2014) (citing Federal Rules advisory
7 committee). “Rule 37(c)(1) is ‘intended to put teeth into the mandatory . . .
8 disclosure requirements’ of Rule 26(a) and (e).” *Ollier v. Sweetwater Union High*
9 *Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014) (citing 8B Charles Alan Wright &
10 Arthur R. Miller, *Federal Practice and Procedure* § 2289.1 (3d ed.2014)). The
11 party that presents untimely testimony bears the burden of demonstrating why the
12 tardy testimony should not be stricken. *Yeti by Molly, Ltd. v. Deckers Outdoor*
13 *Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001) (“Implicit in Rule 37(c)(1) is that the
14 burden is on the party facing sanctions to prove harmlessness.”).
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18 Courts routinely strike or exclude expert testimony submitted in violation of
19 these discovery rules. *E.g.*, *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052,
20 1058-62 (9th Cir. 2005); *Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, at
21 83-36 (9th Cir. 2011); *Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008-09 (8th
22 Cir. 1998) (striking new opinions in affidavit filed in support of motion for
23 summary judgment); *Theoharis v. Rongen*, 2014 WL 3563386, at *8 (W.D. Wash.
24 July 18, 2014); *Luke v. Emergency Rooms, P.S.*, 2008 WL 410672, at *3 (W.D.
25 Wash. Feb. 12, 2008) (unpublished). In addition to these “automatic” exclusion
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1 sanctions, courts have awarded attorney fees incurred in moving to strike newly
2 disclosed expert opinions. *Theoharis*, 2014 WL 3563386 at *8.

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4 **B. Factual Background**

5 Pursuant to the Court's Scheduling Order, the parties were required to
6 submit all expert reports no later than September 22, 2014 and all rebuttal reports
7 no later than October 20, 2014. ECF No. 149. On September 22, Plaintiffs
8 submitted reports from three experts: Byron Shaw, David Erickson, and Robert
9 Lawrence. Declaration of Preston N. Carter in Support of Motion to Strike
10 ("Carter Dec.") at Exhibits 1, 2, and 3, respectively. On October 20, Plaintiffs
11 submitted several rebuttal reports from Shaw and Erickson. Carter Dec. at
12 Exhibits 4, 5, 6, 7, 8 and 9. Based on these reports, Cow Palace deposed
13 Lawrence, Shaw and Erickson on October 23, November 3 and November 4,
14 respectively. Carter Dec. at ¶¶9-10. Discovery closed on November 7. ECF No.
15 149 at ¶6.

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18 On November 17 and 18,¹ Plaintiffs filed new declarations from Shaw,
19 Erickson and Lawrence. ECF Nos. 225, 212, and 213. Each of these declarations
20 contains opinions and facts that were not disclosed in the experts' initial reports or
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25 ¹ Dispositive motions were due on November 17. ECF No. 149 at ¶7. The
26 Declarations of Shaw and Lawrence where were filed on November 18 and are
27 therefore untimely. This provides an additional basis to strike them.

1 rebuttal reports.² In addition, Lawrence's Declaration expresses opinions that he
2 expressly disclaimed during his deposition. *See* Carter Dec., Ex. 13.

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4 **C. Plaintiffs' attempt to present new expert testimony to support their**
5 **Motion for Summary Judgment should be rejected.**

6 Plaintiffs have offered new, previously undisclosed —and sometimes
7 inconsistent —expert testimony in support of their Motion for Summary Judgment.
8 These new opinions should be stricken.

9 **1. Byron Shaw.**

10 Shaw filed an Initial Expert Report ("Shaw Report") on September 22 which
11 spanned more than 230 pages and covered a variety of topics, including the
12 nitrogen cycle, a review of Cow Palace's agricultural fields, and a review of the
13 sampling results from the wells installed by the U.S. Environmental Protection
14 Agency ("EPA") and Cow Palace as part of implementing the March 2013
15 Administrative Order on Consent ("AOC"). Carter Dec., Exh. 1. Thereafter, Shaw
16 submitted a 95-page declaration in support of Plaintiffs' Motion for Summary
17 Judgment. ECF No. 225 ("Shaw Declaration"). While the Shaw Declaration
18 contains some opinions that are cut-and-pasted from the Shaw Report, it also
19 contains entirely new opinions. These new opinions are not delineated in any way.
20 Indeed, many are intermingled with opinions that have been previously expressed.
21 *See* Carter Dec., Exh. 10.
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26 ² Cow Palace has painstakingly identified these previously undisclosed opinions
27 and facts by highlighting them on Exhibits 10, 11, and 12 to the Carter Dec.

1 The most notable of Shaw's new opinions is the fact that he shifts his
2 opinion from one that Cow Palace applied manure in quantities greater than
3 "agronomic rates," to one that Cow Palace applied its manure "without regard to
4 crop fertilization rates." *Compare, e.g.,* Shaw Report (Exh. 1) at p. 20 *to, e.g.,*
5 Shaw Declaration (Exh. 10) at ¶19. This change is material. Whether an
6 application is "agronomic," or whether it is made at "agronomic rates," is a
7 scientific concept that is open to dispute. Whether a party applies manure with
8 regard to crop fertilization rates is an opinion of fact, not of science. Had Shaw
9 expressed this opinion earlier, Cow Palace's deposition of Shaw likely would have
10 proceeded much differently, focusing on the extensive factual record showing that
11 Cow Palace did, indeed, calculate its manure applications with reference to crop
12 fertilization rates.³ Cow Palace also would have had the opportunity to further
13 develop the factual and expert record on this issue.

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18 ³ This evidence includes, for example, spreadsheets showing that Cow Palace
19 included each crop's fertilization needs matched up to that season's application
20 rates. ECF No. 190-10 at p. 156 (Exh. 10.1 to Defendant's Appendix to Statement
21 of Facts). It would also include Mr. Boivin's testimony that Cow Palace calculated
22 manure application rates by matching the nitrogen content in its manure, as
23 estimated in the NMP, with the expected crop fertilization needs, as stated in the
24 NMP. ECF No. 190-3 at ¶41 (when calculating the amount of manure to apply,
25 Cow Palace considered, among other things, how much nitrogen the crop was
26 estimated to need in the upcoming season).

1 In addition, Shaw presents an opinion that nitrate found in groundwater
2 wells are caused by recent agricultural activities, despite the evidence presented by
3 Defendants that past, more inefficient agricultural activities or historical nitrate
4 sources may be the cause of the nitrate. Shaw Decl. at ¶¶100-105. To support this
5 new opinion Shaw cites a variety of documents that he did not discuss in the prior
6 reports. *Id.* at ¶101. In particular, Shaw produces a document entitled, “Yakima
7 groundwater temperatures, in Centigrade.” *Id.* at ¶. 103. That document is not
8 Bates Numbered, and it is not referenced in any of Shaw’s previous reports.
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10 Shaw’s new opinions regarding groundwater recharge are material: one of the
11 disputed issues in this lawsuit is the speed at which nitrates travel through the thick
12 vadose zone under Cow Palace to reach the aquifer, if they do at all. Shaw
13 presents a new opinion on this key topic, after discovery has closed and after Shaw
14 was deposed.
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17 Shaw also presents new opinions regarding Cow Palace’s crop yields, Shaw
18 Declaration at ¶¶24.a – 25; applications before the year’s crop was planted, *id.* at
19 ¶¶28-30; phosphorus and potassium levels, *id.* at ¶¶32-33; possible impacts to
20 surface waters, *id.* at ¶53; and others that are highlighted in Exhibit 10 to the Carter
21 Dec. but that are not discussed separately here. Cow Palace did not have the
22 opportunity to develop a record on, and depose Shaw on, these issues. Each of
23 these new opinions is materials and should be stricken.
24

25 2. Dennis Erickson.

26 Erickson submitted an Initial Report, numerous Rebuttal Reports, and a
27 Declaration in Support of Plaintiffs’ Motion for Summary Judgment (ECF No.

212). Erickson’s Declaration contains opinions and facts that were not disclosed in the previous expert reports. *See* Carter Dec., Exh. 11. For example, in his initial report, Erickson presented what purport to be “calculations” of seepage through Cow Palace’s lagoons, using an equation known as Darcy’s Law and assumptions about various parameters. Exh. 2 at ¶¶49-106. In his Declaration, Erickson presents some of these same calculations, *e.g.*, Exh. 11 at ¶¶39-43, but the results are different. *Compare* Exh. 2 at ¶70 (Lagoon 3 purportedly leaks 9,542 gallons per day) *with* Exh. 11 at ¶43 (Lagoon 3 purportedly leaks 763 gallons per day). Indeed, the calculations presented by Erickson in his Declaration sometimes differ by *an order of magnitude or more* from those presented in his Initial Report. *Id.*; *compare* Exh. 2 at ¶65 (Lagoon 2 purportedly leaks 9,542 gallons per day) *with* Exh. 11 at ¶39 (Lagoon 2 purportedly leaks 1,018 gallons per day). The materiality of these new opinions cannot be disputed: the degree of lagoon seepage is a central dispute in this case. Erickson’s newly disclosed calculations are entirely inappropriate, and should cast doubt upon the propriety—not to mention the accuracy—of his opinions.

Erickson also includes a new statement that, at first, seems innocuous, but is in fact quite material. In paragraph 29 of his Declaration, Erickson states that seepage from a lagoon will migrate in the subsurface “either through saturated flow or unsaturated flow conditions.” Exh. 11 at ¶29. Though his Initial Report contained a paragraph with nearly the same language that paragraph did not contain the statement about “unsaturated flow conditions.” *E.g.*, Exh. 2 at ¶67.

This new opinion is important because Darcy’s Law does not apply to unsaturated

1 flow conditions. ECF No. 190-11 at p. 5 (Exh. 13 to Appendix to Statement of
2 Facts). Erickson thus materially changed his previously disclosed opinion by
3 inserting the reference to unsaturated flow. Erickson also presents other new
4 opinions and additional facts that are identified, but not discussed at length. *See*
5 Carter Dec., Exh. 11. Each of these previously undisclosed opinions should be
6 stricken.
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8 **3. Robert Lawrence.**

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10 Lawrence, Plaintiffs' third primary expert, falls into this same pattern. In his
11 Declaration, Lawrence presents what he contends is evidence "connect[ing] Cow
12 Palace with the nitrate contamination of groundwater." Exh. 12 at ¶10. He also
13 contends that sampling of nine wells by EPA "indicate [that] . . . Cow Palace [] is a
14 source of the increased nitrogen levels in downgradient wells." *Id.* at ¶12. Yet,
15 Lawrence never formed any such opinion in his Initial Report. *See* Lawrence
16 Initial Report. Indeed, in his deposition, Lawrence specifically disavowed any
17 opinion as to whether Cow Palace was the cause of any identified nitrate
18 concentrations. Exh. 13, 14:25-15:5 ("Q: So you are not offering an opinion to a
19 reasonable degree of scientific certainty as to whether or not the nitrates as they
20 appear in the EPA tests or any other testing were caused or – caused by Cow
21 Palace Dairy? A: Correct."). Lawrence also opines that "the mere presence of R.O.
22 systems do not assuage [his] concerns for human health in these properties."
23 Lawrence Dec. at ¶ 15. This opinion was not presented in Lawrence's Initial
24 Report. Each of these new opinions are material: whether Cow Palace is a cause of
25 nitrogen levels in groundwater is hotly disputed, as is the propriety of R.O.
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1 systems—such as those that Cow Palace has installed and maintained under the
2 Consent Order—to treat nitrates. The Lawrence Declaration thus improperly
3 attempts to present new expert testimony well after the deadline had passed.
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5 **D. Cow Palace is entitled to recover the fees incurred in discovering,**
6 **identifying, and moving to strike the new opinions.**

7 Upon reviewing Plaintiffs’ expert declarations counsel for Cow Palace
8 realized that numerous, material new opinions were being expressed. Counsel
9 was, therefore, required to compare the declarations (which are 95, 63, and 17
10 pages long, excluding exhibits) to the experts’ initial (233, 124, and 141 pages
11 long) and rebuttal reports (totaling 69 pages) to identify the new opinions. This
12 tedious exercise was necessary in light of the importance of expert testimony to
13 this case, the importance of the newly expressed opinions, because the experts had
14 already been deposed, and because the discovery deadline had long since passed.
15 Courts in similar circumstances have awarded attorney fees associated with
16 identifying and challenging untimely disclosed expert testimony. *See Theoharis*,
17 2014 WL 3563386 at *8 (awarding fees to party for the time spent “solely on the
18 portion of the reports” that were untimely disclosed). Cow Palace respectfully
19 requests that the Court order Plaintiffs to pay the fees incurred by Cow Palace. If
20 fees are ordered by the Court, Cow Palace will serve an invoice on Plaintiffs within
21 30 days of the Order.
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24 **III. CONCLUSION**

25 For each of the foregoing reasons, Cow Palace respectfully requests that the
26 Court enter an order striking the new opinions and factual bases from the record,
27

1 and an order requiring Plaintiffs to pay the attorney fees incurred in discovering the
2 new opinions and bringing this Motion.
3

4 DATED this 1st day of December 2014.

5 /s/ Debora K. Kristensen

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of December 2014, I caused the following parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing:

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AND I FURTHER CERTIFY that on such date, I served the foregoing on the following in the manner indicated:

None.

/s/ Debora K. Kristensen

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